With *Schall* and *Bellotti*, are Curfew Laws Impacting Minors constitutional?

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I. Introduction

A. The need for review

The due process clause of the Fourteenth Amendment provides *inter alia* that "no state shall deprive any person of liberty without due process of law. In 1997, the Supreme Court in *Washington v. Glucksberg* interpreted the due process clause to guarantee more than fair process such that it protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them including providing heightened protection against government interference with certain fundamental rights and liberty interests unless narrowly tailored to serve a compelling state interest.

As a result, when there is a question of whether a law that impacts the rights of non-delinquent minors violates the due process clause of the constitution, the first issue is whether minors have such a right at all. The Supreme Court has held that citizens have a fundamental right to free movement as part of the amenities of life in *PapaChristou v. City of Jacksonville* (1972). Therefore, the right to freedom of movement is constitutionally guaranteed for all citizens. This is more so because the Supreme Court again held in *Planned Parenthood of Missouri v. Danforth* (1976) that constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. If all citizens have a guaranteed fundamental right to free movement, and constitutional rights do not mature and magically come into being only upon attaining the age of maturity, then all citizens including minors are born with the guaranteed right to move freely without government interference.

Unfortunately, the Supreme Court in *Schall v. Martin* (1984) stated that minors are always in some form of custody and in *Vernonia Sch. Dist. 47J v. Acton* (1995) stated that they are subject to the control of their parents or guardians leading to confusion as to how to apply state limitations to minor's rights. This is especially so in light of the Supreme Courts decision in *Bellotti v. Baird* (1979) which set a three part mutually inclusive test for when minor's rights cannot be equated with those of adults. This test recognizes in its third leg, the interest of the parents in rearing their children but does not identify with the interest of the state to regulate minors. In fact, *Schall*, which supports the interest of the state to regulate minors for crime prevention and protection against victimization, only does so with regard to delinquent minors who have been charged with a criminal misconduct.

Thus, if a law penalizes a minors fundamental right and also penalizes the right of the parent to consent to minors acting on that right, carried out within the ambit of non-criminal conduct, that law should be invalidated as violating due process. One such law is a curfew ordinance which has become a contemporary problem and they all tend to list parental consent as an exception and yet penalize the exercise of parental consent to the whereabouts of their children. Of course, delinquent minors are not contemplated here because their rights would be subject to the interest of the state in preventing crime and protecting the minors against victimization. This paper applies to minors whose only crime would be leaving their homes and remaining in a public place at a time when the law says they cannot do either.

Curfew Laws regarding minors are an offshoot of the Supreme Courts 1960 recognition of the interest of States in making regulations that protect the community

from crime.[1] Prior to the Supreme Court's recognition of this right in *Schall v. Martin* decided in 1984, Curfew laws were historically passed for the welfare of citizens in times of emergency and war[2]. They were temporary and restricted all persons of a certain class for instance, the Japanese during World War II[3]. *Schall v. Martin*[4] decided whether the section of the New York Family Court Act authorizing pretrial detention of accused juvenile delinquents violated the due process clause of the Constitution and held that it did not.

Recently, however cities have taken to passing curfew ordinances to restrict the movement of minors for the stated purpose of preventing crime and protecting minors against victimization. Though, in *Schall*[5], crime prevention is either a compelling or important interest for which a state may regulate its citizens, the law is not settled as to: (1) Whether minors have a fundamental right to personal liberty independent of their parents or (2) Whether regulation is arbitrary when it impinges on the fundamental rights of minors. The rights of minors are not however subordinate to the interests of the state when minors are under the control of their parents. This is because, in *Bellotti v. Baird*[6], the Supreme Court in 1979 decided that "A child merely on account of minority is not beyond the protection of the constitution … and the three reasons why the constitutional rights of children cannot be equated with those of adults are the peculiar vulnerability of children, their inability to make critical decisions in an informed and mature manner, and the importance of the parental role in child rearing. Here, the *Bellotti* Court was deciding

[1] *Schall v. Martin*, 467 U.S. 253, 264 (1984), citing *De Veau v. Braisted*, 363 U.S. 144, 155 (1960) which stated that crime prevention is a matter of compelling and legitimate state interest supported by congresses effort to rid the waterfront area of Florida of ex-felons.
[2] *Rich John*, Analysis of U.S. Curfew Laws, http://www.youthrights.org/curfewana.php, Pp. 2.
[3] *Id.*
[4] *See Generally*, 467 U.S. at 281.
[5] *Id.*
[6] 443 U.S. 622, 633-34 (1979).

whether a Massachusetts statute that requiring pregnant minors seeking an abortion to obtain the consent of their parents or to obtain judicial approval following notification to her parents unconstitutionally burdened the right of the pregnant minors to seek an abortion.

Taking the Supreme Court's decision in *Bellotti* in one hand and its decision about delinquent juveniles in *Schall* in the other, there is confusion as to whether crime prevention is a basis upon which the rights of minors who are not delinquent can be infringed upon. There is therefore reason for this court to clarify its decisions and make it clear that the rights of minors are only limited by parent's right of control and not any state interest. This is because the three part *Bellotti* test requires a consideration of the peculiar vulnerability of minors, their decision making abilities and the rights of their parents to control them. But it makes no mention of any state right to interfere with the liberty of minors.

This paper proposes that minors have a fundamental right to freedom of movement that is limited only by the right of parental control firstly, because citizenship and not age guarantees un-enumerated fundamental rights, and secondly because, according to *Schall* state power to act as *parens patriae* only arises when parental control falters. Balancing *Schall* and *Bellotti*, though State power reaches minors who are delinquent, it only reaches minors who are not delinquent if parental control falters and if the State can show that the minors being regulated are particularly vulnerable to crime and are unable to make informed decisions.

This problem creates a distinction between minors as a group and all other age groups thus treating the former unequally, forcing an equal protection analysis. Though

age is not a recognized suspect or quasi-suspect class, because curfew laws distinguish minors defined as persons' 0-17 years from all others, it treats minors, who are an important class, unequally. Minors are an important class because they are vulnerable and unrepresented politically, thus deserving of protection by the judicial system against abuse by state action. Such abuse comes from laws like the present Curfew ordinance, rendered more arbitrary because it penalizes parental consent. Therefore, to decide whether states may regulate the movement of minors notwithstanding parental consent, the tests in both *Bellotti* and *Schall* have to be put together and proven factually.

As such this paper proposes that intermediate scrutiny be applied to Equal protection analysis because "as applied" challenges to curfew laws have been more successful than "facial" ones. Intermediate scrutiny requires a more fact intensive approach and is likely to arrive at a more principled determination than rational basis or strict scrutiny review. To establish regulatory constitutionality a state would have to show a substantial relationship between the means chosen and the harm sought to be resolved. Although it may be presumed that a fact intensive approach is rather amorphous, not applying each individual set of facts to the law will lead to an absurdly unfair result that will, as has been the trend, tend to lump delinquent juveniles with law abiding children whose parents trust them enough to permit them to be remain in public for a specified amount of time. It is really unjust to throw out the baby with the bath water and that is what Curfew laws do.

B. Scope of the Paper

This paper is limited to the effect of curfew laws on the fundamental rights of minors and on the recognized traditional right of parents to rear their children without

governmental interference, juxtaposed with state interest in crime prevention. I shall limit application of the law to the facts in the hypothetical case below being mindful that several circuit courts have had to address similar challenges to curfew laws.

C. A Case Study

Matusel v. *Leppert, Mayor of the City of Dallas, TX, et al.*

Joseph Matusel and Amanda Matusel, both Citizens of the United States by birth have only two children, their daughter Samantha Matusel who is 12 years old, 5' 4" tall, shy, quiet and easily intimidated and Adam Matusel, 6' 2", a high school football player and 14 years old. They were both born at Presbyterian Hospital of Dallas, Texas and are students enrolled in Skyline High School under the administration of the Dallas Independent School District.

At 11 a.m. on Wednesday in October 2008, when school was in session, but without an excused absence, Samantha and Adam were stopped by Dallas City Police Officer Ryan Brody, within 3 blocks of their home on Gus Thomason Road. They were partly on an errand for their mother that required them to stop twice, first to pick up mail at a post office, then to return a borrowed book to the library before going to the grocery store. But they had to make a detour to a friend's home to pick up the book to be returned to the library. At each stop Officer Brody issued them a citation, and when the parent got involved on the phone, the officer issued her citations as well.

Adam and Samantha have an Aunt who runs a grocery store. They were going there to pick up groceries and wait for their mother when Officer Brody decided it was time to arrest them. Their Aunt objected on the ground that she gave them permission to remain on her business premises. She got issued a citation and her business was issued

one as well. With 3 citations for the minors, 2 for the parents and 2 for both the Aunt and her business, the Plaintiffs were charged under the Curfew Ordinance and have brought suit to challenge its constitutionality and permanently enjoin its enforcement. The ordinance penalizes parental consent if given within the curfew hours and the minor is unaccompanied and it also penalizes detours while on an approved errand. Each citation allows punishment by fine up to $500 for each separate act of remaining committed on the same day.

In support of the ordinance, City presented the following as reasons for regulating the movement of minors; to (a) help curb juvenile crime, (b) combat truancy thereby reducing juvenile crime, juvenile violence and juvenile gang activity occurring in the city during school hours, and (c) to assist parents in the control of their children and will be in the interest of the public health, safety and welfare, and (d) to further the health, safety and welfare of juveniles and other persons, residing in or visiting the city of Dallas. The City also presented statistics in support of increased juvenile crime during nocturnal hours but no similar statistics have been used to show crime rates for school hours.

The District Court held in favor of the Plaintiffs and the City appealed. Relying on its earlier decision in *Qutb v. Strauss*,[7] in overturning the district court's decision, the United States Court of Appeals for the Fifth Circuit upheld the city's ordinance as constitutional and the plaintiffs have been granted certiorari. This paper addresses whether the curfew ordinance is unconstitutional and whether the Supreme Court should enjoin its enforcement.

II. Pervading Issues

A. Minor's Entitlement to Due Process of Law and Impact on Curfew Laws

[7] 11 F.3d 488 (5th Cir. 1993), cert. denied, 511 U.S. 1127 (1994).

Although the Fourteenth Amendments due process clause only talks about personal liberty it has been interpreted by the Supreme Court to guarantee certain rights. Thus in *Bellotti*, the Supreme Court held that "[a] child, merely on account of minority is not beyond the protection of the Constitution and is entitled to due process.[8] In *Glucksberg*, the Supreme Court held that "the Due Process Clause[9] guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint….it protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them….The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests."[10]

One such substantive right is the right to personal liberty which encompasses the right to free movement and thus the court in situations like this would look to substantive due process analysis. For instance in *Glucksberg*, the Supreme Court stated that the established method of substantive-due-process analysis has two primary features: First, the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, or so rooted in the traditions and conscience of the people as to be ranked as fundamental, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.[11] Second, a careful description of the asserted fundamental liberty interest is required.[12] And the Court had held in *Palko*, that the freedom to leave one's house and

[8] 443 U.S. at 633-34.
[9] U.S. Const. Amend. XIV, § 1.
[10] *See, Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997).
[11] *Id.*, quoting, *inter alia, Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937).
[12] *Id.*

move about at will is "of the very essence of a scheme of ordered liberty".[13] Thus the right to move about freely is a fundamental right and apparently age has nothing to do with it but description of this right requires more than identification.

In embarking on the journey toward carefully describing the asserted fundamental liberty interest, the Supreme Court has recognized that the "Nation's history, legal traditions, and practices … provide the crucial guideposts for responsible decision-making that direct and restrain [the courts] exposition of the Due Process Clause.[14]This compels a look at the history of curfew laws and the right to freedom of movement being the asserted fundamental liberty interest and where it came from. In this case, the interest arises from the Fourteenth amendment. And according to the *Glucksberg* Court, "the Fourteenth Amendment forbids the government [from] infring[ing] on fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."[15] To carefully describe that freedom of movement is a fundamental right for which any regulatory infringement must be narrowly tailored to a compelling state interest, the history of curfew laws is therefore relevant.

B. Brief History of Curfew Laws

Generally curfews have often been imposed as a response to an emergency, such as riots and wars, and they usually were implemented only a few days to a few weeks.[16] While these curfew laws were intended to be temporary, modern juvenile curfew laws

[13] *Palko*, 302 U.S. at 325 .
[14] *See, Washington*, 521 U.S. at 719-20.
[15] *Id*.
[16] *Rich John*, Analysis of U.S. Curfew Laws, http://www.youthrights.org/curfewana.php, Pp. 2.

such as the Dallas City Juvenile Curfew Ordinance § 31-33, are intended to be permanent through subject to review every 3 years.[17]

Historically, the Supreme Court has only heard one case to do with a curfew law in history.[18] This case concerned the curfew imposed upon Japanese persons' during World War II and was upheld by the court on the ground that constitutional rights were less applicable in times of war.[19]In 1970, though the Court refused to hear an appeal against a general curfew which applied to all citizens in response to a temporary emergency, Justice Douglas dissented arguing that curfew laws may be necessary when the security of the state is threatened.[20] But he was concerned about the possible abuse of curfew laws in clearing the public of undesirable people such as minorities and argued that a curfew law should be temporary and narrowly defined.[21]

The stated reasons for curfew laws have been the reduction of juvenile crime and victimization but studies have shown that Curfew laws have seldom been an effective tool for this narrow purpose. Two studies done by the Los Angeles Police Department in 1998, each came to opposite conclusions.[22] One that the curfew law in Los Angeles increased crime, and the other that the curfew law decreased crime. [23] Using both statistics of reported crime and reported arrests, Sociologist Michael Males,[24] came to the conclusion that there is no conclusive evidence that a correlation exists between the level of curfew enforcement and the level of juvenile crime that was statistically significant.

[17] *Id.* See, Preamble to Dallas City juvenile Curfew Ordinance, Chapter 31, Para. 6.

[18] *Id.*
[19] *Id. Citing Hirabayashi v. United States,* 320 U.S. 81 (1943).
[20] *Id.*
[21] *Id. Citing Stotland v. Pennsylvania,* 398 U.S. 916 (1970).
[22] *Id.*
[23] *Id.*
[24]A professor at the University of California and Dan Macallair conducted a study of the effectiveness of curfew laws in California published in Western Criminology Review in 1998.

According to the Federal Bureau of Investigation Uniform Crime Reports (1997),[25] adults commit 75 to 90 percent of all reported crime. Having considered a little history, the question of whether minors have a fundamental right to free movement arises because without an asserted liberty interest no substantive due process issue would be in question.

C. Right to freedom of movement for minors

Textually, right to freedom of movement is guaranteed not by age but by citizenship. Under the Fourteenth Amendment, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are **citizens** of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of **citizens** of the United States; nor shall *any state* deprive ***any person*** *of … liberty … without due process of law*; nor *deny* ***any person*** within its jurisdiction the *equal protection of the laws*".[26]

Curfew ordinances impact the right of citizens to free movement, which is a "fundamental right, inherent in **citizens** of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress there from.[27] Though not by the United States Supreme Court, as far back as 1909, a "citizen" was defined as one who enjoys the freedom and privileges of a city, a freeman of a city, as distinguished from a foreigner, or one not entitled to its franchises; an inhabitant of a city; a townsman; a person, native, or naturalized, of either sex, who owes allegiance to a government and who is entitled to reciprocal protection from it; one who is domiciled in a country and who is a citizen

[25] *Rich John*, Analysis of U.S. Curfew Laws, Pp. 3.
[26] U.S. Const. amend. XIV, § 1 (emphasis mine).
[27] *United States v. Wheeler*, 254 U.S. 281, 293 (1920) (emphasis mine).

though neither native nor naturalized, in such a sense that he takes his legal status from such country.[28]

Historically, Citizens have a fundamental right of free movement "as part of the amenities of life as … [t]hese unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity".[29] "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority".[30]

While many courts have found that minors have a fundamental right of free movement, few have found no right at all. For instance, while the Ninth Circuit[31] held that the City's juvenile curfew ordinance impinged on minors fundamental rights of free movement and travel; the Fifth Circuit [32] assumed without deciding that minors have a fundamental right to free movement; and in *McCollester v. Keene*,[33] the first Circuit did not reverse the lower court when it ruled that because freedom of movement is of the very essence of a scheme of ordered liberty, it is protected against state intrusions by the due process clause of the Fourteenth Amendment and thus to justify a law that significantly intrudes on this freedom, a State must demonstrate that the law is "narrowly drawn" to further a "compelling state interest".

The Seventh Circuit on the one hand, had no doubt that although there is room for difference of opinion about the content of the term "liberty" as used in the Fourteenth Amendment, particularly as its meaning may vary between adults and juveniles, the

[28] *Greenough v. Bd. of Police Com'rs of Town of Tiverton*, 74 A. 785, 787 (Rhode Island, 1909).
[29] *See, Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972).
[30] *See, Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976).
[31] *Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997).
[32] *Qutb*, 11 F.3d 488.
[33] 586 F. Supp. 1381, 1385 (D.C.N.H. 1984), citing *Palko*, 302 U.S. at 325.

constitutional protection encompasses children. [34] On the other hand, the District of Columbia Circuit [35] held that minors have no fundamental right in free movement. Lastly, the Second circuit has no doubt that minors do have a right to intrastate travel also referred to as the right to free movement.[36]

D. Curfew Laws and subordination of Minors' rights to that of Adults

Minors' rights are no less fundamental merely because there are traditionally treated differently from those of adults. Minors unlike adults are always in some form of custody.[37] But they are only subject as to their physical freedom to the control of their parents or guardians.[38] The third prong of the *Bellotti* three part test supports this consistent deference to parental and not state control over minors as part of the American cultural ethos reflected in the constitution. It requires a consideration of the parental role in child rearing for the fundamental rights of minors to be subordinated, because parents have a fundamental interest in rearing their children without undue governmental interference[39] and a curfew law that penalizes parental consent interferes with this fundamental interest.

The Ninth Circuit for example, has gone as far as recognizing that because parental power is not subject to the constitutional constraints of state power, that minors' lack rights *vis-à-vis* parents does not necessarily show that they lack those rights *vis-à-vis* the state.[40]This court declined extending the *Vernonia* to establish that the constitution

[34] *Vann v. Scott*, 467 F.2d 1235, 1240 (7th Cir. 1972).
[35] *Hutchins by Owens v. District of Columbia*, 188 F.3d 531 (D.C.Cir.1999).
[36] *Ramos v. Town of Vernon*, 353 F.3d 171 at 176 (2d Cir. 2003), citing *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2d Cir. 1971).
[37] *Schall v. Martin*, 467 U.S. 253, 265 (1984).
[38] *Vernonia Sch. Dist.47J v. Acton*, 515 U.S. 646, 654 (1995).
[39] *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997).
[40] *Nunez v. City of San Diego*, 114 F.3d 935, 944-45 (9th Cir. 1997).

does not secure minors' fundamental right to free movement against the government acting without regard to the parents' wishes.[41]

Minors are entitled to due process but their constitutional rights may be subordinated by the state and cannot always be equated with those of adults. For instance, the Second Circuit stated that if the curfew laws limited the constitutional right to free movement of adults, it would have been subject to strict scrutiny but that analysis is more complicated when the ordinance targets juveniles.[42] However, in adjudicating the constitutionality of such state subordination of minors' rights, the court may treat the rights of minors differently from those of adults only for three reasons: (1) The peculiar vulnerability of children, (2) Their inability to make critical decisions in an informed and mature manner, and (3) The importance of the parental role in child rearing.[43] This *Bellotti* three part test actually gives minors broader freedom to make decisions than has been recognized and does not reach regulation of a fundamental right.[44]

Factually, *Bellotti* involved the right of an unmarried minor during the first twelve weeks of her pregnancy to have an abortion regardless of parental consent when the state required parental consent for the authorization of the abortion procedure.[45] The Court opposed the right of the state to impose a blanket provision requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy and concluded that if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide

[41] *Id.* at 945.
[42] *Ramos*, 353 F.3d at 176.
[43] *See, Bellotti v. Baird*, 443 U.S. 622, 633-34 (1979).
[44] *Id. See generally.*
[45] *Id.*

an alternative procedure whereby authorization for the abortion can be obtained."[46] It did not however oppose parental consent merely the right of the state to require it.[47]

Bellotti does not give the state the right to infringe on minors rights rather it allots the minor more freedom in asserting fundamental rights such as the right to have an abortion [or perhaps the right to move about freely] and takes away the states right to require parental consent for the assertion of a minors fundamental right without alternate opportunity for obtaining consent. Thus for a regulation to constitutionally infringe on the rights of a minor, the state must show that the minors in question are peculiarly vulnerable to the evil sought to be cured by the legislation and that they are unable to make critical decisions in an informed and mature manner.[48]

No jurisdiction that has addressed the question of the constitutionality of curfew laws has required proof of these requirements by the legislatures passing them, nor have they really applied the test in its mutually inclusive form. The test is mutually inclusive because the Supreme Court used the conjunctive "and[49]" and not "or". Rather, The Fifth Circuit upheld the nocturnal portion of the curfew ordinance without going into the *Bellotti* analysis because the court found that the parties all agreed that protection of minors against victimization and prevention of crime were compelling state interests.[50]

Recently, in invalidating a curfew law modeled against the Dallas Ordinance, the second Circuit took a radical approach in that it went straight to consideration of Equal protection and determined that intermediate Scrutiny would be the best test to be applied.

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[46] *Id. at 643.*
[47] *Id. See generally.*
[48] *See generally, Bellotti,* 443 U.S. 622.
[49] *Id.*
[50] *Qutb*, 11 F.3d at 492.

If the rights of minors may be subordinated to that of adults in certain circumstances, the question becomes who can subordinate those rights and when can they be subordinated. This leads to the interest of parents in rearing their children without undue governmental interference.

E. Fundamental Interest in Rearing Children

It is settled that parents have a fundamental interest in rearing their children without undue governmental interference but the question is whether this interest has been unconstitutionally infringed upon by Curfew Laws' regulation of the right to free movement of minors in the care of their parents. "In addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights…to direct the education and upbringing of one's children."[51] Children by definition are not assumed to have the capacity to take care of themselves.[52] They are assumed to be subject to the control of their parents, and **if** parental control falters, the state must play its part as *parens patriae*.[53] Courts have failed to require that states show a faltering of parental control before rendering the minor subject to the state's role as *parens patriae*.[54]

Though all courts agree that parents have a fundamental interest in rearing children without undue governmental interference, they are not in agreement as to whether curfew laws violate this interest.[55] For instance, the fourth Circuit found that the limited curtailment of juvenile liberty in the ordinance violates neither a minor's nor a parent's rights even when the ordinance prohibits activities that have the parents' full

[51] *Id.*
[52] *Schall*, 467 U.S. at 265.
[53] *Id.*
[54] *Id., generally.*
[55] *Schleifer v. City of Charlottesville*, 159 F.3d 843, 852-53 (4th Cir. 1998).

approval but do not fall under one of the ordinances eight exceptions.[56] The ninth Circuit[57] on the other hand found that the right to rear children without governmental interference is a fundamental component of due process and stated that "the curfew is, quite simply, an exercise of sweeping state control irrespective of parents' wishes. Without proper justification, it violates upon (sic) the fundamental right to rear children without undue interference".[58]

Similarly, though the fifth Circuit, while ruling on the constitutionality of the nocturnal portion of the Dallas Curfew Ordinance in question in 1993, recognized parents' right to rear children without undue governmental interference as a fundamental component of due process, the court upheld the ordinance because the parents failed to convince the court that the ordinance will impermissibly impinge on their rights as parents.[59] The parents' only evidence in support of their argument was the testimony of one of the plaintiffs that her daughter who would soon be going to college, would somehow be deprived of the opportunity to learn to manage her time and make decisions before going away to college when the ordinance applies only between 11p.m. and 6 a.m.[60]

In contrast, the second circuit invalidated a curfew ordinance that mirrors the Dallas Ordinance though narrower in its application, on the ground that it violates the Equal Protection Clause of the Fourteenth Amendment.[61]Thus, though a parent as legal custodian of his child, may be able to restrict his child's liberty with impunity (subject of

[56] *Id.*
[57] *Nunez*, 114 F.3d at 951, *Citing Ginsberg v. State of N.Y.*, 390 U.S. 629, 639 (1968).
[58] *Id.*
[59] *Qutb*, 11 F.3d at 495-96.
[60] *Id.*
[61] *Ramos v. Town of Vernon*, 353 F.3d 171 at 174 (2003).

course, to child abuse legislation), it does not follow that a state has the same unfettered rights as a parent merely because it becomes legal custodian of the child.[62]

F. Equal Protection Analysis

"The equal protection clause is essentially a direction that all persons similarly situated should be treated alike". *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). "The Curfew Ordinance distinguishes between classes of individuals on the basis of age, treating those persons under age seventeen differently from those persons age seventeen and older."[63] Many courts have considered this to be unequal treatment, even though age is not a suspect classification, because the regulation has a disparate impact on persons 0-17 years from all other persons. *Id.* Courts have tried to fit the problem of juvenile curfews into the existing formal framework of the tiers of scrutiny.[64]

What level of Scrutiny if any?

The tiered approach to the Equal Protection Clause arose through the Warren Court at a time when the major constitutional issues of the day were about race.[65]On the one hand, basic economic legislation was considered the proper business of legislatures and courts developed the rational basis test under which economic legislation would survive constitutional challenge unless it was wholly irrational.[66] On the other hand, discriminatory legislation against African Americans during the Civil Rights Era which required aggressive judicial review to enforce the mandates of the Reconstruction

[62] *Vann*, 467 F.2d at 1240.
[63] *Qutb*, 11 F.3d at 492.
[64] *David A. Herman*, 82 N.Y.U. L. Rev. 1857, 1860-61 (December 2007).
[65] *Id.*, 82 N.Y.U.L. Rev. at 1858.
[66] *Id.*

Amendments against reluctant state governments led to the creation of "strict scrutiny".[67] Strict Scrutiny requires that a law be narrowly tailored to achieve a compelling government interest. [68]

All courts, while not in agreement about whether freedom of movement is a fundamental right, have recognized that the interest of minors in freedom of movement requires a higher level of scrutiny than basic rational basis.[69] Whilst some have applied intermediate scrutiny, considering the facts more deeply in determining the constitutionality of the statute, others have gone as far as applying strict scrutiny and contemplating whether the states interest is compelling enough to survive. The city of Vernon modeled its curfew ordinance after the Dallas Curfew Ordinance upheld by the 5th Circuit, but the 2nd Circuit in 2003 held that Vernon ordinance unconstitutional while making an articulate case for intermediate scrutiny.[70]

(a) Rational Basis

Generally, legislation is presumed to pass constitutional muster and will be sustained if the classification drawn by the statute or ordinance is rationally related to a legitimate state interest.[71] Because age is not a suspect classification, distinctions based on age are generally subject to rational basis review.[72] A law will survive this level of scrutiny unless the plaintiff proves that the law's class-based distinctions are wholly irrational.[73] However, because the curfew ordinance does not merely affect age classifications but

[67] *Id.*
[68] *Id.*
[69] *See for instance*, *Qutb* 11 F.3d 488 (5th Cir.); *Schleifer*, 159 F.3d 843(4th Cir.); *Nunez*, 114 F.3d 935 (9th Cir.); *Vann*, 467 F,2d 1235 (7th Cir.), *Ramos*, 353 F.3d 171 (2d Cir.) to mention a few.
[70] *See generally*, *Ramos*, 353 F.3d 171.
[71] *City of Cleburne v. Cleburne Living Ctr.*, Inc., 473 U.S. 432, 439-40 (1985).
[72] *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991).
[73] *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981).

impinges on the right to free movement, courts have tended to apply a stricter test, either the more recently introduced intermediate scrutiny or strict scrutiny.

(b) Intermediate Scrutiny

Intermediate scrutiny is typically used to review laws that employ quasi-suspect classifications such as gender.[74]On occasion intermediate scrutiny has been applied to review a law that affects an important though not constitutional right.[75] Under intermediate scrutiny, the government must show that the challenged legislative enactment is substantially related to an important government interest.[76]

The Second Circuit deeply analyzed the benefits of applying intermediate scrutiny in *Ramos v. Town of Vernon*[77]. Recognizing as this paper proposes, the need to accept the existence of the right to free movement of intrastate travel in order to fairly decide what level of scrutiny should be applied.[78] Even cases that have declared that minors have no fundamental right in freedom of movement have applied a higher test than rational basis.[79]

(c) Strict Scrutiny

If a classification disadvantages a "suspect class" or impinges upon a fundamental right, the ordinance is subject to strict scrutiny.[80] For example, the Court has applied this level of scrutiny to a program that discriminated on the basis of race, a suspect classification[81], and to a case in which an apparently facially neutral poll tax regulation

[74] *Craig v. Boren*, 429 U.S. 190, 197 (1976).
[75] *United States v. Coleman*, 166 F.3d 428, 431 (2d. Cir. 1999).
[76] *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980).
[77] 353 F.3d 171, 175-76 (2d Cir. 2003).
[78] 353 F.3d at 176.
[79] *Hutchins by Owens v. District of Columbia*, 188 F.3d 531 (D.C. Cir.1999).
[80] *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982).
[81] *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989).

actually discriminated on the basis of wealth in allocation of right to vote[82]. To satisfy strict scrutiny, the government must show that the law is narrowly tailored to achieve a compelling governmental interest.[83]

The fifth Circuit, assumed without deciding that minors have a right to free movement and applied strict scrutiny because the parties all agreed that the interest of the state is compelling, the Fifth Circuit found it unnecessary to conduct a full *Bellotti* analysis.[84] However, in deciding whether the ordinance was narrowly tailored to the stated government interest, the fifth Circuit identified the articulated purpose of the curfew ordinance as being to protect juveniles from harm and to reduce juvenile crime and violence occurring in the City of Dallas.[85] In contrast the second circuit inferred that because this articulated purpose shows that the curfew was passed for the benefit of others in the community, the constitutionality of the ordinance was more suspect.[86]

In line with this thinking, the Ninth Circuit found that although the state may have a compelling interest in regulating minors differently than adults, no less degree of scrutiny than strict scrutiny review is appropriate to review burdens on minors' fundamental rights.[87] However, this court was mindful that applying strict scrutiny in the context of minors may allow greater burdens on minors than would be permissible on adults as a result of the unique interests implicated in regulating minors.[88]In this case, Angel Ramos, one of the plaintiffs, was found in violation of the curfew ordinance on

[82] *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668-70 (1966).
[83] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).
[84] *Qutb*, 11 F.3d at 494.

[85] *Id.*
[86] *Ramos*, 353 F.3d 171 at 176.
[87] *Nunez*, 114 F.3d at 946.
[88] *Id.*

numerous occasions because he was out past curfew with general permission from his mother but without permission to be on a specific errand or out pursuant to any of the enumerated exceptions in the ordinance.[89]

III. Application

Adam and Samantha Matusel are not beyond the protection of the constitution merely on account of their minority, being 14 and 12 years of age respectively, and are entitled to due process of law.[90] The Fourteenth Amendment guarantees their right to individual liberty against government actions such as the Curfew ordinances infringement of their right to free movement regardless of the fairness of the procedures used to implement them.[91]It also provides heightened protection against government interference with the fundamental right to freedom of movement and equal protection of the Matusel children and the liberty interests of the Matusel parents infringed upon by the Dallas Curfew Ordinance.[92]

Because the right to freedom of movement has been considered to be a right so fundamental that it is deeply rooted in the traditions and conscience of the people as to be implicit in the concept of ordered liberty such that neither liberty nor justice would exist if there were sacrificed[93]so much that there have been in part responsible for giving people the feeling of independence and self-confidence, the feeling of creativity[94], Adam and Samantha Matusels citations by the Dallas Police Officer Ryan Brody violates the first feature of substantive due process analysis. The second feature of substantive due

[89] *Ramos*, 353 F.3d at 173.
[90] *Bellotti*, 443 U.S. at 633-634.
[91] *Washington*, 521 U.S. at 719-20.
[92] *Id.*
[93] *Palko*, 302 U.S. at 325-26.
[94] *Papachristou*, 405 U.S. at 164.

process analysis requires a careful description of Adam and Samantha's asserted fundamental liberty interest.[95]

Adam and Samantha's right to leave their house and move about at will is of the very essence of scheme of ordered liberty[96]and unless regulatory infringement of this right is narrowly tailored to serve a compelling state interest, the Fourteenth Amendment forbids it.[97] While curfew laws were historically imposed in response to an emergency such as riots and wars but were implemented only for a few days to a few weeks, modern curfew laws like the Dallas Ordinance are intended to be permanent though subject to review every 3 years.[98]Like most other challenged curfew laws, appealing to the Supreme Court for Certiorari, the Dallas Curfew Ordinance has the stated purpose of reducing juvenile crime and victimization with the same inconsistent statistics of whether there have been successful in fulfilling their purpose but concern has risen to outrage about abuse of this regulatory procedure in clearing public places of "undesirable persons" in this case minors like the Matusel children.[99]

The relationship of crime prevention to regulation is insignificant especially when adults are responsible for 75 to 90 percent of all reported crime rendering juvenile regulations unnecessary in comparison.[100]Adam and Samantha both being born to United States Citizens at the Presbyterian Hospital of Dallas, have the right to freedom of movement because this right as provided in the constitution of the United States has its roots in their citizenship and not age. When the text of the constitution identifies the

[95] *Palko*, 302 U.S. at 325-26.
[96] *Id.*
[97] *Washington*, 51 U.S. at 719-20.
[98] *Rich John,*Analysis of U.S. Curfew Laws at pp. 2. See, Preamble to Dallas City juvenile curfew ordinance, Para. 6.
[99] *Id.*
[100] FBI Uniform Crime Reports (1997) as cited to by *Rich John,* Analysis of U.S. Curfew Laws.

fundamental rights to personal liberty and equal protection, it does not distinguish between minor citizens and adult citizens.[101] Also, the only judicial definition of citizenship[102] does not distinguish by age but by the rights or freedoms and privileges of its members, and it is this class of persons who are entitled to due process of law under the fourteenth amendment.

Because many courts would agree that Adam and Samantha have a fundamental right to free movement[103], and only a few would hold otherwise[104] it may be safe to say that minors do have a fundamental right to free movement, though there are traditionally treated differently from adults. Thus the Matusel children are presumed to be in the custody of their parents.[105]Their fundamental right to free movement guaranteed by the constitution against state interference renders them to the physical control of their parents or guardians only.[106] This proposition is supported, when the constitutionality of regulating minors arises, by the third prong of the 3 part test[107] requiring deference to parental and not state control over minors.

The *Bellotti*[108] test requires that the court consider, in treating Adam and Samantha's rights differently from those of other adults, their peculiar vulnerability, their inability to make critical decisions in an informed and mature manner and the importance of Joseph and Amanda's parental role in rearing their children. Only the Second Circuit[109] has considered the effect of the ordinance on the minor in question and on the right of the

[101] 14th Amendment.
[102] *Greenough*, 74 A. at 787.
[103] *Ramos*, 353 F.3d 171 (2d. Cir. 2003); *Schleifer*, 159 F.3d 843 (4th Cir. 1998); *Nunez*, 114 F.3d 935 (1997); *Qutb*, 11 F.3d 488 (5th Cir. 1993); *Vann*, 467 F.2d 1235 (7th Cir. 1972).
[104] *Hutchins*, 188F.3d 531.
[105] *Schall*, 467 U.S. at 265.
[106] *Vernonia*, 515 U.S. at 654.
[107] *Bellotti*, 443 U.S. 633-34.
[108] *Id.*
[109] *Ramos*, 353 F.3d

parent to consent to activities because in all cases prior to this one, the minors have either facially challenged the ordinance or have conceded that the state has a compelling interest in regulating juvenile crime without balancing these interests against the *Bellotti* test.

Though, society has a legitimate interest in protecting a juvenile, this protection is against the consequences of the juvenile's criminal activity both from potential physical injury which may be suffered when a victim fights back or a policeman attempts to make an arrest and from the downward spiral of criminal activity into which peer-pressure may lead the child.[110] In essence a peculiar situation that does not apply to minors who are not delinquent and under the supervision of their parents such as Adam and Samantha.

The tests in *Bellotti v. Baird* cannot be interpreted to limit the rights of the minor but rather it compels the state to use its police power with respect for the rights of the minors and the parents. Thus these tests can be classed as welfare oriented rather than penalty oriented. But the Dallas Curfew ordinance applies the tests to penalize the movement of the minors without stating how restriction of their movement will assist the minors and their parents without interfering with their rights as citizens.

Courts have wrongly attributed quasi-parental role to the state when the parents have not defaulted in their role as biological or adoptive parents or wards.[111]Furthermore, the ordinance specifies no crime other than remaining on public premises within specified hours and permits arrests even when the minor is not suspected of doing anything wrong. Adam and Samantha were not doing anything illegal by carrying out errands for their mother.

[110] *Schall*, 467 U.S. at 266.
[111] *Id.*

The police officer, under the ordinance is given the discretion to determine whether the exceptions apply or not so as to issue a citation against parental consent, so that the police officer and not the parent could determine whether Samantha's peculiar vulnerability of being bullied in School was reasonable cause to be out of school and recuperating in the company of her brother even with parental consent. This situation is similar to that of Angel Ramos[112] who also had general permission to be out from his mother.

It is state police power that is limited by the equal protection clause of the Fourteenth Amendment and not parental rights. State Police Power is further limited by *Bellotti*'s Test when the subject of a regulation is minors and the object is to infringe on a fundamental right. Because of this interest, applying strict scrutiny may be inconsistent with a prudential balance of the rights of parents to control their children, the rights of minors to move about freely and the interest of the state in preventing juvenile crime and victimization. Yet applying rational basis will be too mild a review considering the possible infringement of a fundamental right. The most applicable standard of review would be to apply intermediate scrutiny and with fact intensive approach the court may be persuaded to enjoin enforcement of curfew laws against minors because they do not serve a welfare purpose and will eventually condemn law abiding minor citizens to arrest for merely being children rather than for committing an actual crime.

Most importantly, the curfews pretended purpose of assisting parents with controlling their children is a farce because if that were the purpose then the ordinance would not penalize parents for consenting to their children remaining in a public place such as their aunt's grocery store or penalize detours that may be required to complete an

[112] *Ramos*, 353 F.3d at 173.

errand like Adam and Samantha's situation. They needed to collect the book from a friend's home in order to complete the errand of dropping it off at the library. Harmless conduct but punishable under the Ordinance. The very idea of a person, no matter how young having to look over his shoulder and shudder to think of going out for ice cream for instance, in case he sees a police officer, goes against the very essence of a free society and erodes the idea of a scheme of ordered liberty. The language of the court of the years has been quite consistent when it said that constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.

Unfortunately, officer Brody was well within his rights under this ordinance to practically stalk Adam and Samantha because that is what the ordinance, by its language, permits him to do. The only remedy against this kind of arbitrary treatment would be to render all such curfew ordinances, where there is no state of emergency or war, unconstitutional and permanently enjoin their enforcement. If the unstated purpose of the ordinance is to keep minors in school then the officers should be subject to the approval of parents once confirmed because short of child abuse, the right to rear children must be free of governmental interference at all levels[113].

IV. Conclusion

This paper has sought to prove firstly, that minors have a right to personal liberty which is not tainted either by their minority or by any state interest but only by their subjection to parental control as a result of their vulnerability. Secondly, curfew ordinances are unconstitutional because they infringe on minors rights to personal liberty and Equal protection of the laws by creating a class of vulnerable and politically unrepresented persons and targeting them for fundamental rights infringement. Thirdly,

[113] *Id.*

because the Supreme Court plays a prominent role in protecting the rights of any class of persons who are either politically unrepresented or are vulnerable to abuse of process, it ought to abrogate all curfew ordinances. But abrogation is not necessary when the law is passed during times of emergency or for very narrowly tailored purposes which must be, at least substantially related to an important governmental interest. This is especially so, when that interest is more for the benefit of the community at large than for the welfare of minors.

Lastly, if the Supreme Court allows states to continue to penalize minors for no other crime than being children in a public place, all persons below the age of 18 will be under house arrest for their entire childhood and many being children will break "free" and become criminals subject to arrest upon reaching the age of 18 merely for taking a stroll or committing truancy. The right to move about freely is, after all, part of the ethos of the American system.

Parents, who by the curfew laws are required to be with their children whenever they are in public places will be unable to function independently, and will be forced to reduce contribution to the work force in order for one parent to be available to cater for their children's "hanging out" needs. This totally erodes single parents from being able to work at all. This is a slippery slope because if the Court allows this trend to continue then there is no telling what other infringements on parental control the state will introduce. Also there will be no end to States controlling minors against the will of their parents. What would be the purpose of recognizing the right of parents to rear their children without undue governmental interference if parents oppose regulation of the children's movement and State's are able to regulate them anyway? It is necessary therefore for the

Supreme Court to clarify its decisions in *Bellotti* and *Schall*, so that put together Courts will have a better understanding of the limitations on state power to regulate the rights of minors.

Any juxtaposition of the right of parents to rear children without government interference and the right of minors to free movement in one hand of the scale of justice, and in the other, the interest of the state in regulating crime prevention weighs in favor of the minor.

The only way to arrive at another conclusion would be to ignore the source of the right to freedom of movement and presume that the state has rights in loco parentis over and above parents and guardians. This conclusion goes against every ethos of the American judicial and cultural experience and takes away rights from private citizens for the benefit of the state without due process. Perhaps, one could concede that a facial challenge could permit such an arbitrary reading of a constitutional right but when a persons liberty has actually been infringed upon, like the Matusel's have experienced, both as minors and parents, the family has only one recourse and that is to the courts to uphold the principles upon which the United States constitution was founded.

Even if the parties involved are not a recognized suspect class, the interest of the parents is recognized and protected. Also, the constitution does not limit Joseph and Amanda Matusel's right to raise their children but limits the State from using its police power to encroach on parental interests and the rights of the minors.

Assuming without conceding that the court sees some interest in upholding even a portion of the ordinance, then application should be narrowly tailored to the specific

requirements of the *Bellotti* test so that each individual case will be taken within its own factual context.